(1)

NO. 05420

IN THE

SUPREME COURT OF THE UNITED STATES

MIRTHA VALDIVIA ACOSTA,

Petitioner

v.

U. S. ATTORNEY GENERAL

Respondent

On Petition for Writ of Certiorari
To the United States Court of Appeal for the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Question One: Whether the Court of Appeals erred in requiring substantial constitutional issues to warrant review of Petitioner's case.

Question Two: Whether this Court's statutory interpretation in the St. Cyr decision created disparate treatment between aliens who entered into a plea agreement and those aliens who were convicted by a jury trial.

CORPORATE DISCLOSURE STATEMENT

No parties are corporations. Sup. Ct. R. 29.6

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mirtha Valdivia-Acosta, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeal for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeal (App. 24a-25a) is not reported. The Opinion of the Board of Immigration Appeals (App. 21a, 23a) is not reported. The Opinion of the Immigration Judge (App. 10a, 11a,13a-19a) is not reported.

JURISDICTION

Appellant seeks a writ of certiorari and appeals a final order of removal from the United States Court of Appeals for the Eleventh Circuit ("11th Cir.") pursuant to 28 U.S.C. § 1252(a)(2)(D) (1990) and 28 U.S.C. 1254(1)(1948). Section 1252(a)(2)(D) does not preclude constitutional claims or questions of law despite statutory limitations of review noted within Section 1252(a)(2). *Id*; See Cabrera-Alvarez v. Gonzales, Docket No. 04-72487, 9th Cir., Filed September 8, 2005); citing to Fernandez–Ruiz v. Gonzales, 410 F.3d 585, 587 (9th Cir. 2005) (interpreting the amendments to 8 U.S.C. §1252 enacted in the REAL ID Act of 2005; Pub.L. No. 109-113, 119 Stat. 231).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

8 U.S.C. § 1252(a)(1) (1990)

8 U.S.C. § 1252(a)(2)(B) (1990)

8 U.S.C. § 1252(a)(2)(B)(i) (1990)

8 U.S.C. § 1252(a)(2)(C) (1990)

8 U.S.C. § 1252(a)(2)(D) (1990)

21 USC Sec. 841(a)(1)

21 USC Sec. 846

18 USC Sec. 2

INA § 212 (c)

INA § 237 (a)(2)(B)(i)

INA § 237 (a)(2)(A)(iii)

INA § 242 (a)(2)(B)(i)

INA § 242 (a)(2)(B)

INA § 242 (a)(2)(C)

INA § 245

Antiterrorism and Effective Death Penalty Act (AEDPA) Pub.L. No. 194-132, 110 Stat. 1214

Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) Pub. L. No. 104-208, 110 Stat. 3009

STATEMENT OF THE CASE

Petitioner is a 44 year-old grandmother of a United States Citizen grandchild and Mother of two United States Citizen

children. She is a citizen of Cuba. Petitioner became a Lawful Permanent Resident on April 5, 1981 and had no problems with the law until 1988. In 1988 Petitioner was charged and convicted of the offenses of possession with the intent to distribute at least 500 grams of cocaine, in violation of 21 USC Sec. 841(a)(1) and 18 USC Sec. 2, as well as conspiracy to possess with the intent to distribute cocaine, in violation of 21 USC Sec. 846. She was sentenced to seven years of imprisonment followed by four years of supervised release. She appealed her conviction and said conviction was affirmed. Petitioner served her time and was released in 1994. Upon her release, a progress report was issued and there was no indication of INS detainers or current charges for the Petitioner. On August 31, 1992, the INS issued a Record of Deportable Alien, however, Petitioner was not detained at that time.

On July 1, 2002, the INS issued a letter to Petitioner requesting that she appear on August 1, 2002. Due to re-assignment to a new deportation officer, the Petitioner and her Counsel were issued a Notice to Appear on August 28, 2002. Petitioner and Counsel appeared on August 28, 2002 at which time Respondent was served with a Notice to Appear at EOIR in early 2003 (and an Order of Supervision) stating that she was removable pursuant to INA Sec. 237(a)(2)(B)(i) because of her conviction of a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to controlled substance (as defined in Section 102 of the Controlled Substances Act, 21 U.S.C. 802), other than a single offense involving possession for one's own use of 30 grams or less of marijuana. The Service placed Petitioner in removal proceedings specifically because she was convicted -not by entering into a plea agreement.

At the November 8, 2002 Master Calendar in Petitioner's Removal case, Petitioner admitted to the four allegations and

also conceded removability. The Service then informed the Court that it intended to amend the charges to include an aggravated felony charge (which it did on January 8, 2003). The Petitioner then requested the following forms of relief: 212(c) Waiver, or in the alternative, 212(h) Waiver, and also Cancellation of Removal for Permanent Resident Aliens, contending that she was not an aggravated felon and was therefore qualified for Cancellation of Removal for Permanent Resident Alien to restore her status as a Lawful Permanent Resident of the United States.

The Immigration Judge denied Petitioner's request on the basis that she did not fall within the scope of the St. Cyr decision since her conviction was not obtained through a plea agreement. The Board of Immigration of Appeals affirmed the opinion initially without opinion. However, upon its denial of Petitioner's Motion to Re-open, the BIA issued an opinion indicating its agreement with the Immigration Judge. The Eleventh Circuit Court of Appeals held the Motion to Re-open was barred and no substantial legal question warranted review.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals erred in requiring substantial constitutional issues to warrant review of Petitioner's case.

A. Standard of review and applicable law.

For issues of statutory interpretation that hinge upon interpretation of the [law] in a manner consistent with international law, the Court of Appeals has jurisdiction. See Cabrera-Alvarez v. Gonzales, 2005 U.S. App. LEXIS 19373

(9th Cir. Sept. 8, 2005). Notwithstanding the jurisdictional bar within Section 1252(a)(2)(C), the Court of appeals is authorized to review constitutional claims or questions of law. Cabrera-Alvarez, 2005 U.S. App. LEXIS 19373 (9th Cir. Sept. 8, 2005). The Court of Appeals has reviewed questions of law, particularly those reviews of the INA, de novo. See e.g. Melkonian v. Ashcroft, 320 F.3d 1061 (9th Cir. 2003).

The Court of Appeals reviews decisions made by the Board. The Court normally does not consider the rulings and findings of immigration judges unless they impact the Board's decision. Since the Board affirmed the immigration judge's findings and conclusion without opinion (and then later agreed with the IJ), the Court of Appeals can review the immigration judge's findings here. Efe v. Ashcroft, 293 F.3d 899, 908 (5th Cir. 2002). The Board's factual conclusions are reviewed for substantial evidence. Questions of law are reviewed de novo. The Court of Appeals gives great deference to an immigration judge's decisions concerning an alien's credibility. Efe, 293 F.3d at 909.

In Montero-Martinez v. Ashcroft, 277 F. 3d 1137, (9th Cir. 2002), Petitioners sought review of the BIA's decision denying them the underlying discretionary relief of Cancellation of Removal based upon statutory ineligibility for failure to have a qualifying relative. The Petitioners there claimed that their Lawful Permanent Resident, adult daughter was a child, within the meaning of the statute and that they therefore had a qualifying relative. Before proceeding to the merits of the case, the Court looked to see if it was precluded from doing so based upon the INA § 242(a)(2)(B)(i), 8 U.S.C. § 1252(a)(2)(B)(i). The Court found that, because the determination of whether the Petitioners' adult daughter was a child within the meaning of the statute for cancellation of removal purposes, it had jurisdiction to consider this purely legal and hence non-

discretionary question. It then proceeded to review the case on its merits.

The case at bar is similar to Montero-Martinez v. Ashcroft. Here, the Petitioner seeks the underlying discretionary relief of adjustment of status based upon her marriage to a United States Citizen if her status as a Lawful Permanent Resident cannot be restored by virtue of a 212(c) waiver. The Petitioner's request for a 212 (c) waiver was denied by the Immigration Judge and affirmed on appeal by the Board of Immigration Appeals. Then, Petitioner's request for application of the 212(c) waiver was denied again when the Eleventh Circuit Court of Appeals opined that the Petitioner's Motion to Reopen was barred based on their decision in the case of Patel. Patel v. U.S. Attorney General of the United States, 334 F.3d 1259. 1261-62 (11th Cir. 2003)

In revisiting the analysis in Montero-Martinez v. Ashcroft, before proceeding to the merits of the case, this Court must look to see if it is precluded from doing so based upon INA § 242(a)(2)(B), (C) and (D), 8 U.S.C. § 1252(a)(2)(B), (C) and (D). To determine whether the Petitioner is prima facie eligible for adjustment of status, this Court has jurisdiction to consider this purely legal and hence non-discretionary question, pursuant to INA § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(D). Notwithstanding congressional limitations on judicial review stated in Section 1252(a)(2)(C), the Court is obligated to review final orders of removal where constitutional claims and questions of law are raised. See 8 U.S.C. § 1252(a)(2)(D).

B. The Court of Appeals erred in requiring substantial constitutional issues to warrant review of Petitioner's case.

In Patel, the Eleventh Circuit Court of Appeals interpreted 8 U.S.C. §1252 (a) (1) as inherently authorizing the Court to address Motions to reopen, however, the Court further surmised that Section 1252 (a)(2)(C), within the same title, simultaneously stripped the Court from reviewing final orders of removal for aliens convicted of an aggravated felony. In reliance on its decision in Patel, the Eleventh Circuit Court of Appeals recognized their jurisdiction of review extends to questions of legal claims. *See* Patel v. U.S. Attorney General of the United States, 334 F.3d 1259,1261-62 (11th Cir. 2003); 8 U.S.C. §1252(a)(2)(D). However, the Eleventh Circuit Court of Appeals' error lies within their reasoning that Section 1252(a)(2)(D) requires raised constitutional claims and questions of law be *substantial* to warrant judicial review.

In Kamara v. Attorney-General, the Third Circuit Court of Appeals recognized the parameters of its jurisdiction as to review of final orders of removal and noted Section 106 (A)(1) (iii) of the REAL ID Act amended 8 U.S.C. §1252 as follows:

> Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

Kamara v. U.S. Attorney-General of United States, 420 F. 3d 202 (3d. Cir. 2005); 8 U.S.C. §1252 (a)(2)(D).

The Third Circuit further found restoration of its jurisdiction where constitutional claims and questions of law are raised by an alien, even criminal aliens. Kamara v. Attorney-

General of United States, 420 F. 3d 202 (3d. Cir. 2005). The Kamara analysis did not construe 8 U.S.C. §1252 (a)(2)(D) as requiring any raised constitutional claims and questions of law be substantial to invoke its review. In its scrutiny of the statute against dismissal of the Petitioner's habeas petition, the Third Circuit found guidance in the principle that Congress' explicit intent was to provide aliens with one chance of judicial review in the court of appeals. Kamara v. U.S. Attorney-General of United States, 420 F. 3d 202 (3d. Cir. 2005) (citing H.R. Conf. Rep. No. 109-72, at 174-76 (2005);cf. Sorrells v. United States, 287 U.S. 435, 450 (1932)(...To construe statutes so as to avoid absurd or glaringly unjust results, foreign to the legislative purpose, is, as we have seen, a traditional and appropriate function of the courts). If Congress wished to differentiate between those constitutional claims or legal questions with a certain quantitative impact and those which do not, then arguably it would have placed the language "substantial" within Section 1252(a)(2)(D). More importantly, the Eleventh Circuit Court of Appeals did not find Petitioner's Motion to Reopen and arguments in support, thereof, failed to state *any* constitutional claim or questions of law. Thus, there was no basis to dismiss the Petitioner's Motion to Reopen.

As well, the determination of whether the Petitioner is admissible based upon a 212(c) waiver to avoid an impermissible, retroactive effect for conviction after trial rather than a guilty plea, is a matter of procedural due process. Due process is satisfied only by a full and fair hearing. Ibrahim v. INS, 821 F.2d 1547, 1550 (11th Cir. 1987); citing Wong Yang Sung v. McGrath, 339 U.S. 33, 49-51, 70 S.Ct. 445, 453-54, 94 L.Ed. 616 (1950). Moreover, failure to evaluate her claim for such relief would be a denial of procedural due process, a constitutional issue pursuant to INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C). This Court, then, should proceed to review this case on its merits.

II. This Court's statutory interpretation in the St. Cyr decision,created disparate treatment between aliens who entered into a plea agreement and those aliens who were convicted by a jury trial

A. Retroactive application of the repeal of 212 (c) relief to Petitioner would attach new legal consequences to Petitioner's decision made prior to AEDPA and IIRAIRA and doing so would disturb Petitioner's settled expectations

In 1996, two laws were passed that had grave consequences for many aliens. The AntitTerrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 194-132, 110 Stat. 1214 and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA), Pub. L. No. 104-208, 110 Stat. 3009. Prior to the passage of those acts, certain forms of deportation relief for those convicted of a crime existed, such as a waiver under Section 212(c) of the Immigration and Nationality (INA). Lawful Permanent Resident aliens who were convicted of crimes determined to be aggravated felonies *were* eligible for such Section 212(c) relief *provided* that they had not served a prison term of five years or more. AEDPA and IIRIRA repealed the types of deportation relief those same aliens could face and those laws sought to apply their mandates retroactively to crimes committed prior to their passage. However, in the landmark case of INS v. St. Cyr, 533 U.S. 289; 121 S. Ct. 2271 (2001), the Supreme Court concluded that applying the repeal to immigrants who pled guilty before the new laws were enacted would cause an impermissible effect.

In St. Cyr, this Court recognized that immigrants are "acutely aware"of the immigration consequences when they decide whether to go to trial or accept a plea, and rely on the

law governing discretionary relief when making those critical decisions in their criminal cases. INS v. St. Cyr, 533 U.S. 289; 121 S. Ct. 2271 (2001).

Although the Petitioner did not plead guilty, the Petitioner should still fall within the exception created in St. Cyr. She was convicted at trial prior to 1996, and retroactive application of the repeal of 212(c) relief to her would attach new legal consequences to her decision made prior to the passage of AEDPA and IIRAIRA, and doing so would disturb her settled expectation of remaining in the United States.

This Court spent a great deal of careful discussion on Congress' intent to retroactively apply the effects of AEDPA and IIRAIRA. It stated the following:

> "The inquiry into whether a statute operates retroactively demands a commonsense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment.'" Martin, 527 U.S., at 357-358 (quoting Landgraf, 511 U.S., at 270). A statute has retroactive effect when it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past. . . .'"[fn46] *Id.*, at 269 (quoting Society for Propagation of the Gospel v. Wheeler, 1814 U.S. App. LEXIS 179 (C.C.D.N.H. 1814). As we have repeatedly counseled, the judgment whether a particular statute acts "retroactively" should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations.'" Martin, 527 U.S., at 358 (quoting Landgraf, 511 U.S., at 270).

St. Cyr, at 321.

This Court's analysis then turned, as appropriate, to the facts particular to St. Cyr. Enrico St. Cyr pled guilty to a state offense which involved drug trafficking. For further instruction, this Court looked to the facts surrounding the case of Jideonwo v. INS, 224 F.3d 692, 699 (7th Cir. 2000) wherein, Jideonwo entered into "extensive plea negotiations with the Government, the sole purpose of which was to ensure that "'he got less than five years to avoid what would have been a statutory bar on 212(c) relief.'" INS v St. Cyr, 533 U.S. 289, 323; 121 S. Ct. 2271 (2001) (quoting Jideonwo v. *INS*, 224 F.3d 692, 699 (7th Cir. 2000). In Petitioner's review of this Court's opinion, in St. Cyr, there appears to be an underlying intent to uphold the basic principles of contract law. As this Court stated, "Plea agreements involve a *quid pro quo* between a criminal defendant and the government. St. Cyr at 321 (citing e.g. Newton v. Rumery, 480 U.S. 386, (1987). However, the facts in St. Cyr do not suggest the plea agreement contained assurances of the availability of 212(c) should a removal proceeding arise in exchange for a reduced sentence. Arguably, the INS is the only entity charged with powers to institute proceedings of removal or exclusion. Hence, the St. Cyr reasoning makes a leap in concluding the Criminal Prosecutor could make promises regarding the impact of a plea on the aliens' legal status. The decision, in St. Cyr, to allow application of the 212(c) waiver to those aliens who entered plea agreements, raises a presumption that every plea negotiation, pre-ADEPA and IIRAIRA, included discussions about the legal impact on the aliens legal status within the United States.

While the Petitioner appreciates the importance of not disturbing plea agreements, there is no explicit language, in IIRAIRA, to implicate that the availability of the 212(c) waiver should be limited to only aliens entering in a plea agreement. As this Court will recall, a two-step process was

employed in determining Congress' intent to retroactively apply AEDPA and IIRAIRA. This process was noted by the Ninth Circuit Court of Appeals as follows:

> If Congress has clearly expressed that a law should be applied to conduct occurring before its enactment, our inquiry ends and we must defer to Congress' command. Otherwise, we proceed to Landgraf's second step and ask "whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* If the new law would have such a retroactive effect, the "traditional presumption teaches that [the new statute] does not govern.

Garcia-Ramirez v. Gonzales, 2005 U.S. App. LEXIS 18425 (9th Cir. Aug. 26, 2005). This retroactive application of those statues would fail, here, under the second step since a new legal effect arose. Thus, the Petitioner calls on this Court to consider the circumstances where the alien has been ill advised about the consequences of a jury trial conviction on her legal status.

In the case at bar, the situation is even graver for Petitioner who was not given the opportunity to weigh the immigration consequences of her decision of whether or not to go to trial. Neither her counsel at trial nor the judge informed Respondent of the consequences of going to trial or entering into a plea agreement. In Brooks v. Ashcroft, 283 F.3d at 1274, the Court stated that "[t]here can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions." Citing St. Cyr., 121 S. Ct. at 2291. However, that was not the case

here—the Respondent here was *not* told by her then-counsel or the Court of the immigration consequences of her conviction after a trial.

While this Court in St. Cyr did not require proving actual reliance on the availability of 212 (c) relief, it specifically noted that "preserving the [immigrant's] right to remain in the United States may be more important to the [immigrant] than any potential jail sentence." Had Petitioner been made aware of the immigration consequences of going to trial or of the consequences of serving five years of her sentence, she could have made the decision of entering a plea agreement rather than going to trial. See Also Archibald v. INS, 2002 U.S. Dist. LEXIS 11963 (E.D. Pa. Jul. 1 2002); Bosquet v. INS, 2001 U.S. Dist. LEXIS 13573 (S.D.N.Y., Sept.6, 2001). Furthermore, in the Second Circuit, as discussed in Purdy v. U.S., 208 F.3d 41 (2d. Cir. 2000), citing, Cullen v. United States, 194 F.3d 401 (2d. Cir. 1999); United States v. Gordon, 156 F.3d 376, 380 (2d. Cir. 1998); Boria v. Keane, 99 F.3d 492 (2d Cir. 1996); and Jones v. Murray, 947 F.2d 1106-1110 (4th Cir. 1991), Lawyers are obligated to inform their clients of the risks of pleading guilty versus going to trial. The failure of her counsel and the trial judge to warn Petitioner of the immigration consequences of a decision to go to trial should not now be used to bar the Petitioner from obtaining the 212(c) relief for which she was eligible at the time of her conviction. Despite the legal ramification of retroactively applying AEDPA and IIRAIRA, consequences resulted from the decision in St Cyr namely- disparate treatment of aliens.

B. Retroactive application of IMMACT of 1990 would attach new legal consequences to Petitioner's decision made in 1988 and doing so would disturb Petitioner's settled expectations of remaining in the U.S.

Naturally, this Court set the precedent for how courts should treat similar cases. However, the same result has not occurred.

For example, in the case of Cordes v. Gonzales, the Ninth Circuit Court of Appeals held that the INS application of St. Cyr created disparate treatment and therefore violated the Equal Protection Clause. Specifically, it noted:

> ....[t]he disparate treatment of Cordes and those permanent residents who are entitled to section 212(c) relief under St.Cyr lacks a rational basis. Because Cordes does not fit within the St. Cyr exception, the law treats her differently than those permanent resident aliens who formed settled expectations as to the availability of section 212(c) relief because they committed severe, deportable offenses. Had Cordes committed a more severe crime — one that would have rendered her deportable — she would have been eligible for such relief and been able to preserve the relief even though her crime was later reclassified as an aggravated felony.

Cordes v.Gonzales, 2005 U.S. App. LEXIS 18425 (9th Cir. Aug. 24, 2005).

Likewise, the Petitioner is equally treated differently because she, too, does not fit within the guidelines under *St. Cyr*. If the Petitioner pled guilty to those crimes charged, then section 212 (c) relief would have been available to her right now. Retroactive repeal of 212(c) relief to the Petitioner here would attach the new legal consequences of mandatory removal to Petitioner on a decision she made prior to the enactment of AEDPA and IIRAIRA and so that would disturb her settled expectation of being able to remain

in the United States with her family, as the law existed at the time of her conviction.

In Matter of Ramirez-Somera, 20 I&N Dec. 564 (BIA 1992), where the Respondent in that case was a 30-year-old native and citizen of Mexico. He was lawfully admitted to the United States for permanent residence on December 14, 1983, at San Ysidro, California. On October 11, 1989, he was convicted in the District Court of Nevada in and for Clark County, of conspiracy to sell a controlled substance (cocaine) for which he was sentenced to a period of confinement of 3 years. He was also convicted on the same day in the same court of trafficking in a controlled substance (cocaine) for which he was sentenced to a 15-year period of incarceration to run concurrently with the aforementioned sentence. The Respondent in that case was found by the BIA, in 1992, to be statutorily eligible for section 212(c) relief because he had not yet served five years of his sentence.

In Ponnapula v. Ashcroft, 235 F.Supp.2d 397, 402 (M.D.P.A. 2002), the Court stated "[D]oes the fact that Petitioner was convicted at trial, rather than by guilty plea, change the result dictated by St. Cyr? Given the factual underpinnings of this case, the Court concludes that it does not." The Court, at 406, went on to point out the following:

> There is no basis to assume that Congress sought to distinguish between those immigrants who were convicted because they pled guilty, or those convicted after trial. In IIRAIRA, Congress legislated with respect to convictions—not trials or pleas...While it is true that the Supreme Court in St. Cyr only addressed those aliens who were convicted after guilty pleas, it did so not because that group of aliens is the only group still eligible for discretionary relief. Rather, that was the factual scenario presented to the Court in that

> case. Under Respondents' approach, a defendant who pleads guilty to a particular deportable offense would have the right to seek § 212(c) relief; however a defendant who, after weighing the immigration consequences, opts to go to trial and is convicted of an identical charge would face mandatory deportation. *It is inconceivable that Congress intended such a result.* (Emphasis added).

Note however, and as stated in Toia v. Fasano & Ashcroft, 334 F.3d 917, 918 (9th Cir. 2003), that in 1990, Congress rendered ineligible for 212(c) relief any alien who had been convicted of an aggravated felony and who had served a term of imprisonment of at least five years. Immigration Act of 1990, Pub. L. No. 101-649, Sec. 511(a), 104 Stat. 4978, 5052 ("IMMACT"). In Toia v. Fasano & Ashcroft, 334 F.3d at 918, the Court stated:

> In INS v. St. Cyr, 533 U.S. 289, 150 L. Ed. 2d 347, 121 S. Ct. 2271 (2001), the Supreme Court considered whether IIRIRA applied retroactively, precluding aliens who had plead guilty prior to its 1996 enactment from eligibility for Sec. 212(c) relief. The Court held that it did not: IIRAIRA did not strip aliens who pleaded guilty prior to the enactment of IIRAIRA, in reliance on the availability of Sec. 212(c) relief, of their eligibility for that relief. 533 U.S. at 326. The question before us is whether the reasoning of St. Cyr. applies equally to aggravated felons incarcerated for at least five years who pleaded guilty prior to IMMACT, believing that they would be eligible for Sec. 212(c) relief. *We hold that it does.* (Emphasis added).

Here, the Petitioner was convicted of a controlled

substance offense but was sentenced to a 7-year period of incarceration. Petitioner was not detained by INS in 1989 as no INS detainer was outstanding for her. And, in 1992, an INS detainer was issued but not executed against her. Hence, Petitioner had no reason to seek 212(c) relief. Had she been taken into INS custody or had she been warned of the immigration consequences of her conviction, she would have applied for 212(c) relief before she would have served 5 years of her sentence. Therefore, Petitioner qualifies for a 212(c) waiver under St. Cyr and Toia v. Fasano & Ash because at the time of her conviction, the 212(c) waiver did not require that the alien serve less than five years of imprisonment and had she been made aware of the availability of the 212(c) waiver at the time of her conviction and that two years *after* her conviction the law would change to require that she serve less than 5 years of imprisonment, she would have applied for it *before* she had served even one year of her sentence. See Gomez v. Ashcroft, et. al., 2003 U.S. Dist LEXIS 10160 (E.D.N.Y. Jun. 17 2003).

C. Marriage Adjustment of Status

Petitioner's removal should be reversed and she should be granted a 212(c) waiver and her Lawful Permanent Resident Status be restored. In the alternative, she should be found eligible to adjust her status to that of a Lawful Permanent Resident based upon her marriage to a United States Citizen, pursuant to INA § 245 and based upon a 212(c) waiver of the aggravated felony. Although her marriage took place whilst she was in removal proceedings, she is eligible for a bona fide marriage exemption, pursuant to INA § 245(e).

CONCLUSION

For all of these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

8 U.S.C. § 1252. Judicial Review of Orders of Removal.
(a) Applicable provisions —

(1) General orders of removal — Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225 (b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review —

(B) Denials of discretionary relief — Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review —

(i) any judgment regarding the granting of relief under section 1182(h),1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

(C) Orders against criminal aliens — Notwithstanding any other provision of law (statutory or nonstatutory), including

section 2241 of title 28,United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(D) Judicial Review of Certain Legal Claims — Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

Section 242. *of INA*

(1) General orders of removal.-Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 235(b)(1) is governed only by chapter 158 of title 28 of the United States Code, except as provided in subsection (b) and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review.-

(A) REVIEW RELATING TO SECTION 235(b)(1).- Notwithstanding any other provision of law, no court shall have jurisdiction to review-

(i) except as provided in subsection (e), any individual determination or to entertain any other cause or claim arising

from or relating to the implementation or operation of an order of removal pursuant to section 235(b)(1),

(ii) except as provided in subsection (e), a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 235(b)(1)(B), or

(iv) except as provided in subsection (e), procedures and policies adopted by the Attorney General to implement the provisions of section 235(b)(1).

(B) Denials of Discretionary Relief.-Notwithstanding any other provision of law, no court shall have jurisdiction to review-

(i) any judgment regarding the granting of relief under section 212(h), 212(i), 240A, 240B, or 245, or

(ii) any other decision or action of the Attorney General the authority for which is specified under this title to be in the discretion of the Attorney General, other than the granting of relief under section 208(a).

(C) Orders against criminal aliens.-Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 212(a)(2) or 237(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 237(a)(2)(A)(ii) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 237(a)(2)(A)(i).

Section 237 of the INA

(a) Classes of Deportable Aliens.- Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

(1) Inadmissible at time of entry or of adjustment of status or violates status.-

(A) Inadmissible aliens.-Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable.

(B) Present in violation of law.-Any alien who is present in the United States in violation of this Act or any other law of the 2b United States, or whose nonimmigrant visa (or other documentation authorizing admission into the United States as a nonimmigrant) has been revoked under section 221(i), is deportable.

(2) Criminal offenses.-

(A) General crimes.-

(i) Crimes of moral turpitude.-Any alien who-

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 245(j) after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed.

(ii) Multiple criminal convictions.-Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

(iii) Aggravated felony.-Any alien who is convicted of an aggravated felony at any time after admission is deportable.

(iv) High Speed Flight.-Any alien who is convicted of a violation of section 758 of title 18, United States Code, (relating to high speed flight from an immigration checkpoint) is deportable.

(v) Waiver authorized.-Clauses (i), (ii), (iii), and (iv) shall not apply in the case of an alien with respect to a criminal conviction if the alien subsequent to the criminal conviction has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States.

(B) Controlled substances.-

(i) Conviction.-Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

Section 304(b) of IIRAIRA

"SEC. 240A. (a) CANCELLATION OF REMOVAL FOR CERTAIN PERMANENT RESIDENTS.-The Attorney

General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien-

"(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

"(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

"(3) has not been convicted of any aggravated felony.

Section 321. Amended Aggravated Felony Definition of IIRAIRA

(a) IN GENERAL.-Section 101(a)(43) (8 U.S.C. 1101(a)(43)), as amended by section 441(e) of the Antiterrorism and Effective Death Penalty Act of 1996 (P.L. 104-132), is amended-

(3) in subparagraphs (F), (G), (N), and (P), by striking "is at least 5 years" each place it appears and inserting "at least one year";

(4) in subparagraph (J), by striking "sentence of 5 years' imprisonment" and inserting "sentence of one year imprisonment";

Section 322. Definition of Conviction and Term of Imprisonment of IIRAIRA

(a)DEFINITION.-

(1) IN GENERAL.-Section 101(a) (8 U.S.C. 1101(a)) is amended by adding at the end the following new paragraph:

"(48)(A) The term 'conviction' means, with respect to an alien, a formal judgment of guilt of the alien entered by a

court or, if adjudication of guilt has been withheld, where-

"(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and

"(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

Section 435. Expansion of Criteria for Deportation for Crimes of Moral Turpitude of AEDPA

(a) In General.--Section 241(a)(2)(A)(i)(II) of the Immigration and Nationality Act (8 U.S.C. 1251(a)(2)(A)(i)(II)) is amended to read as follows:

"(II) is convicted of a crime for which a sentence of one year or longer may be imposed,".

(b) Effective Date.--The amendment made by subsection (a) shall apply to aliens against whom deportation proceedings are initiated after the date of the enactment of this Act.

Section 212(c) waiver under INA

c) Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 211(b). This subsection shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate

offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i).

Section 245 of INA

(a) The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification under subparagraph (A)(iii), (A)(iv), (B)(ii), or (B)(iii) of section 204(a)(1) or may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if

(1) the alien makes an application for such adjustment,

(2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and

(3) an immigrant visa is immediately available to him at the time his application is filed.

21 U.S.C. § 841. Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

18 U.S.C. § 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

21 U.S.C. § 846. Attempt and conspiracy
Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

28 U.S.C. § 1254. Courts of appeals; certiorari; certified questions
Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Immigration Court
155 South Miami Ave, Room
Miami, Florida 33030

In the matter of : Case no. A37-177-997

VALDIVIA-ACOSTA, MIRTHA
respondent

IN REMOVAL
PROCEEDINGS

Order of the Immigration Judge

This is a summary of the oral decision entered on 5/13/03. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the trial decision will become the official opinion in this case.

[√] The respondent was ordered removed from the United States to Cuba.

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to ____ alternative _____

[ ] Respondent's application for voluntary departure was

granted until upon posting a bond in the amount of $ _____ with an alternative ____ of removal to _____

[ ] Respondent's application for asylum was ( ) granted ( ) denied, ( ) withdrawn

[ ] Respondent's application for withholding of removal was ( ) granted ( ) denied, ( ) withdrawn

[√] Respondent's application for cancellation of removal under Section 240A was ( ) granted (√) denied, ( ) withdrawn

[ ] Respondent's application for cancellation of removal was ( ) granted under Section 240A (b)(1); ( ) granted under Section 240A (b)(2); ( ) denied, ( ) withdrawn. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[√] Respondent's application of a waiver under Section 212(h) of the INA was ( ) granted (√) denied, ( ) withdrawn or ( ) other.

[ ] Respondent's application for adjustment of status under Section _____ of the INA was ( ) granted ( ) denied, ( ) Withdrawn. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's status was rescinded under section 296.

[ ] Respondent is admitted to the United States as a _____ until _____.

[ ] As a condition of admission, respondent is to post a $____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper malice.

[√] Respondent was advised of the limitation or discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision. Proceedings were terminated.

[√] Other:

Date: 5/13/03

Appeal ____ Reserved Appeal due by:

6/12/03

PAW

_____/s/_____
Denise M. Lane
Immigration Judge

United States Department of Justice
Executive office for Immigration Review
United States Immigration Court
Miami, Florida

File A 37 177 997 May 13, 2003

In the Matter of

MIRTH VALDIVIA-ACOSTA } IN REMOVAL PROCEEDINGS
}
}
Respondent }

Charge: Section 237(a)(2)(B)(i) of the Immigration and Nationality Act – convicted of a controlled substance

Charge: Additional charges of Inadmissibility / Deportability (Form I-261) – Section 237 (a)(2)(A)(iii) of Immigration and Nationality Act- alien who has been convicted of an aggravated felony at any time after admission

Application: Cancellation of removal for certain permanent Resident pursuant to Section 240A of Immigration and Nationality Act; waiver of inadmissibility pursuant to section 212 (h) of Immigration and Nationality Act; waiver of inadmissibility pursuant to section 212 (c) Of Immigration and Nationality Act.

On behalf of Homeland On behalf of

On behalf of Homeland Security:	On behalf of Respondent:
Melissa Hart, Esquire Assistant District Counsel Miami, Florida	Georgia B. Gillett, Esquire Attorney At Law Miami, Florida

Oral decision of the Immigration Judge

The respondent is a female, native and citizen of Cuba, who was last admitted to the United States through Miami, Florida on or about April 15, 1981 as an immigrant. On or about September 23, 1988, the respondent was convicted by a guilty verdict under counts 1 and 2 of her indictment period. The respondent was convicted by a guilty verdict through a jury trial under count 1 for possession with intent to distribute, cocaine, in violation of Title 21, United States Code, Section 841 (a) (1) and Title 18, United States Code, and Section 2.

The respondent was also convicted by a guilty verdict by a jury trial under Count 2 of her indictment of conspiracy to possess with intent to distribute a controlled substance, cocaine, in violation of Title 21, United States Code, Section 846.

The respondent was sentenced to 7 years on each count, with each count to run concurrently with each other. The respondent was assessed costs and was ordered unsupervised for at least 4 years.

In a Notice to Appear, dated August 28, 2002, the respondent was charged with removability pursuant to Section 237 (a)(2)(B)(i) of Immigration and Nationality Act. The respondent, through counsel admitted four factual allegations contained in the Notice of Appear and conceded removability as charged under Section 237 (a)(2)(B)(i) of

Immigration and Nationality Act. The Court sustained, by clear and convincing evidence, on November 8, 2002, the charge of removability in the Notice of Appear under Section 237 (a)(2)(B)(i) of Immigration and Nationality Act.

Cuba was designated as the country of removal by the respondent. Through counsel, the respondent sought relief through Cancellation of removal for certain permanent Resident pursuant to Section 240A of Immigration and Nationality Act; waiver of inadmissibility pursuant to section 212 (h) of Immigration and Nationality Act; waiver of inadmissibility pursuant to section 212 (c) Of Immigration and Nationality Act.

During the master calendar hearing, on or about January 8, 2003, the Government filed a Form I-261, additional charges of inadmissibility/deportability. Therein, the Government lodged an additional charge under Section 237 (a)(2)(A)(iii) of Immigration and Nationality Act for conviction that constitutes an aggravated felony period. The Respondent, through counsel, objected to the Form I-261 as it was untimely filed. Counsel lodged the objection during the master calendar proceedings on March 12, 2003. However, the Court admitted the Form I-261 as Exhibit 4 as it had been filed with the court timely on or about January 8, 2003. During the master calendar proceedings on March 12, 2003, the respondent, through counsel, denied the charged under Section 237 (a)(2)(iii) of Immigration and Nationality Act.

Based on the respondent's admissions to the four factual allegations in the Notice to Appear, within Exhibit 1, and the certified copy of the respondent's conviction record, within Exhibit 2, as well as the deportable alien, Form I-213, within Exhibit 3, the Court respectfully sustained by clear and convincing evidence, on March 12, 2003, the charge of removability under Section 237 (a)(2)(A)(iii) of the Immigration and Nationality Act.

On December 9, 2002, the respondent, through counsel, filed a brief supporting 212 (c) waiver, or in the alternative 212 (h) waiver, and cancellation of removal for permanent residence. On January 8, 2003, the former Immigration and Nationalization Service filed a written motion to pretermit the respondent's 212 (h) waiver and cancellation of removal application. On or about March 11, 2003, the Department of Homeland Security filed a Supplemental motion to pretermit the respondent's 212 (c) application.

The record reflects that the respondent was convicted on or about September 23, 1988, of possession with intent to distribute, cocaine, and conspiracy to possess with intent to distribute, cocaine, in violation of federal law. The respondent's offenses are felonies. The Court is satisfied that the respondent was convicted of an aggravated felony. An aggravated felony is defined under statute to constitute illicit trafficking in a controlled substance including any drug trafficking crime defined under Title 18, of the United States Code, Section 924(c). See Section 101(43)(B) of Immigration and Nationality Act. The respondent's conviction of possession with intent to distribute cocaine, and conspiracy to possess with intent to distribute cocaine are clearly both trafficking offenses and constitue aggravated felonies. See Matter of Yanez, 23 I&N Dec. 390 (BIA 2002).

Inasmuch as this Court has concluded that the respondent has been convicted of aggravated felonies, the Court will grant the Government's motion to pretermit the respondent's application for cancellation of removal for certain permanent residents and application for waiver of inadmissibility pursuant to Section 212 (h) of the Immigration and Nationality Act as contained within Exhibit 6. the respondent is statutorily ineligible for cancellation of removal for certain permanent residents based on her

convictions of aggravated felonies pursuant to Section 240A (a) (3) of Immigration and Nationality Act.

The record reflects that the respondent is a lawful, permanent and was so admitted in that status in the United States on or about April 5, 1981. Inasmuch as the respondent is a lawful, permanent resident, convicted of aggravated felonies, the Court will also grant the Government's motion to pretermit the respondent's application of 212 (h) for a waiver of inadmissibility. Under Section 212 (h) of the Immigration and Nationality Act, no waiver shall be granted under subsection in the case of an alien who has been previously admitted to the United States as an alien lawfully admitted for permanent residence if either, since day of admission, the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period not less than 7 years in really proceeding the date of initiation of proceeding to remove the alien from the United States. In this respondent's case, the respondent has been convicted of an aggravated felony, since date of her admission into the United States as a lawfully admitted for permanent residence. As such, the respondent is statutorily ineligible for a waiver of inadmissibility pursuant to Section 212(h) of the Immigration and Nationality Act.

The respondent has sought the relief of a waiver of inadmissibility pursuant to Section 212 (c) of the Immigration and Nationality Act based on the Supreme Court decision in INS v. St. Cyr, 122 S. Ct. 2271 (2001). The Supreme Court held that section 212 (c) relief remains eligible for aliens like St. Cyr who (1) were convicted through plea agreements and (2) notwithstanding those convictions, would have been eligible for Section (c) relief at the time of their plea under the law in effect at that time. See St. Cyr, supra at 2293. Employing the retroactive analysis formed in Landgraf v. USI Film Products, et al., 114 S. Ct. 1483, the Supreme Court determined that Section 304(b) of

the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) produce an impermissible retroactive effect on aliens who had entered into plea agreements in reliance on their availability of Section 212 (c) relief. The Supreme Court further held that, thus, that Section 304(b) could not be applied retroactively in such cases.

The respondent, through counsel, filed a rebuttal brief in support of her application of Section 212(c) of the Immigration and Nationality Act. The respondent argues that notwithstanding the fact that she was convicted of 2 drug trafficking offenses after trial, the retroactive effect would impermissibly bar her from Section 212 (c) relief.

The Court will respectfully grant the Government's motion to pretermit the respondent's waiver of inadmissibility pursuant to Section 212(c) of the Immigration and Nationality Act. Based on the Court's review of the Supreme Court decision in St. Cyr, the Court respectfully concludes that the respondent does not fall within the holding of the decision by the Supreme Court therein. The Supreme Court clearly wrote in St. Cyr that the impermissible retroactive effects of Section 304 (b) of IIRAIRA applied only to aliens who had been convicted pursuant to plea agreements. Clearly, the respondent present before the Court was not convicted of her two drug trafficking offenses pursuant to a plea agreement, thus she does not fall within the parameters established in the St. Cyr. decision. Further this Court notes that in the Eleventh Circuit, the jurisdiction under which this Court falls, stated in Brooks v. Ashcroft, 283 F. 3d 1268, 1273-75 (11th Cir. 2002), that allowing the St. Cyr precedent to only apply to individuals found guilty by plea agreements was constitutional.

While this Court acknowledges that it may be unfair to allow retroactive application of Section 304 (b) of IIRAIRA to individuals convicted following trial, such is the

state of the law after St. Cyr. as a result of the respondent's convictions after trial, she is ineligible for a waiver of inadmissibility under Section 212(c) of Immigration and Nationality Act.

The respondent has sought no other relief for removal. Accordingly, the following orders will be entered.

It is ordered that the Department of Homeland Security's order to pretermit the respondent's cancellation of removal for certain permanent resident pursuant to Section 240A of Immigration and Nationality Act; waiver of inadmissibility pursuant to section 212 (h) of Immigration and Nationality Act; waiver of inadmissibility pursuant to section 212 (c) Of Immigration and Nationality Act are hereby respectfully granted.

It is further ordered that the respondent's applications for cancellation of removal for certain permanent resident pursuant to Section 240A of Immigration and Nationality Act, waiver of inadmissibility pursuant to section 212 (h) of Immigration and Nationality Act, waiver of inadmissibility pursuant to section 212 (c) Of Immigration and Nationality Act are hereby denied based on statutory ineligibility.

It is furthered ordered that the respondent be removed from the United States to Cuba under charges of Section 237 (a) (2) (B) (i) and Section 237 (a) (2) (iii) of Immigration and Nationality Act as contained in the respondent's Notice to Appear, dated August 28, 2002, and in the additional charged of inadmissibility/deportability dated January 8, 2003.

Denise Lane
United States Immigration Judge
Miami, Florida
May 13, 2003

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Office of the Clerk

5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

Georgia B. Gillett, Esquire
2700 W. Atlantic Blvd.
Suite 200
Pompano Beach, FL
33069-0000

Office of the Chief Counsel/MIA
333 South Miami Ave.,
Suite 200-32
Miami, FL 33130

Name: VALDIVIA-ACOSTA, MIRTHA A37-177-997

Date of this notice: 4/20/2004

Enclosed is a copy of the Board's decision and order in the above referenced case.

Sincerely,
/s/
Frank T. Kidder,
Acting Chief Clerk

Enclosure
Panel Members:
HOLMES, DAVID B.

U.S. Department of Justice Decision of the Board of Immigration Appeals

Executive Office for Immigration Review
Falls Church, Virginia 22041

File A37-177-997 Miami Date: 4/20/2004

In re: VALDIVIA-ACOSTA, MIRTHA

IN RE REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Gillett, Georgia B., Esquire

ON BEHALF OF DHS: Williams, Sidney K., Assistant Chief Counsel

ORDER:

PER CURIAM. The Board affirms, without opinion, the decision below. The decision below is therefore, the final agency determination. See 8 C.F.R. §1003.1(e)(4).

/s/
(signature of David B. Holmes)
FOR THE BOARD

21 e

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Office of the Clerk

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Office of the Chief Counsel/MIA
333 South Miami Ave
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Miami, FL 33130

Name: VALDIVIA-ACOSTA, MIRTHA A37-177-997

Date of this notice: 11/10/2004

Enclosed is a copy of the Board's decision and order in the above referenced case.

Sincerely,
/s/
Frank T. Kidder,
Acting Chief Clerk

Enclosure

Panel Members:
MILLER, NEIL P.

U.S. Department of Justice Decision of the Board of Immigration Appeals

Executive Office for Immigration Review
Falls Church, Virginia 22041

File A37-177-997 Miami Date: 11/10/2004

In re: VALDIVIA-ACOSTA, MIRTHA

IN RE REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Gillett, Georgia B., Esquire

ORDER:

PER CURIAM. This matter was last before us on April 20, 2004, when we summarily affirmed the decision of the Immigration Judge finding respondent removable as charged and ineligible for relief. The respondent has now filed a motion to reopen. The motion will be denied. As previously explained by the Immigration Judge in her May 13, 2003, the respondent's conviction after a plea of not guilty precludes his eligibility for 212 (c) relief under *INS v. St. Cyr*, 533 U.S. 289 (2001). Nor has the respondent otherwise shown prima facie eligibility for adjustment of status. Accordingly the motion is denied.

/s/
(signature of Neil P. Miller)
FOR THE BOARD

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-164488-FF

CIRCUIT COURT OF APPEALS
ELEVENTH CIRCUIT
JUNE 29, 2005
THOMAS KAHN CLERK

MIRTHA VALDIVIA-ACOSTA,

Petitioner

Versus

UNITED STATES ATTORNEY GENERAL,

Respondent

On Petition for Review of an Order of the
Board of Immigration Appeals

Before: ANDERSON, DUBINA, AND TJOFLAT, Circuit Judges.

BY THE COURT:

The respondent's motion to dismiss is GRANTED. Review of the November 10, 2004 agency determination denying the petitioner's motion to reopen is barred. See 8 U.S.C. §1252(a)(2)(C); Patel v U.S. Attorney General, 334 F. 3d 1259, 1261-62 (11th Cir.2003). moreover, a review of the record and the petitioner's brief reveals no substantial

constitutional issue that warrants our review. See Gonzalez-Oropeza v. U.S. Attorney Gen.,321F.3d1331,1333(11th Cir.2003).